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SUPREME COURT, U.S.

82 6498

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1982

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DELMA BANKS, JR.

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI OF THE COURT OF CRIMINAL  
APPEALS OF TEXAS

---

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DELMA BANKS, JR.

Petitioner,

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THE STATE OF TEXAS,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL  
APPEALS OF TEXAS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas, entered November 3, 1982, rehearing denied January 3, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 640 S.W. 2d 311 (1982) and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the rule of Witherspoon v. Illinois, 391 U.S. 510, as further defined in Adam v. Texas, 448 U.S. 38, (1980) was violated by the exclusion for cause of two prospective jurors when it excused for cause jurors number eleven and thirty-five systematically under Article 12.31(b) who would not automatically answer in the negative the fact issues required by Article 37.071 Texas Code of Criminal Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS  
INVOLVED

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1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.
2. This case also involves the following provisions of Texas

Texas Penal Code §12.31. Capital Felony.

- (a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.
- (b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Texas Code of Criminal Procedure Article 37.071. Procedure in Capital Case.

- (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be constructed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or his counsel shall be permitted to present argument for or against sentence of death.
- (b) On conclusion of the presentation of evidence, the court shall submit the following issues to the jury:
  - 1. Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
  - 2. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
  - 3. If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
- (c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.
- (d) The court shall charge the jury that:
  - 1. it may not answer any issue "yes" unless it agrees unanimously; and
  - 2. it may not answer any issue "no" unless 10 or more jurors agree.
- (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a

negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

- (f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not exceed 30 days by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

## STATEMENT

By an indictment filed on May 22, 1980, Delma Banks, Jr. was charged with murdering Richard Wayne Whitehead, on or about April 12, 1980, in the course of a robbery. He entered a plea of not guilty.

During the period of September 22, 1980 to October 1, 1980, Mr. Banks was tried in the 102nd Judicial District Court of Bowie County, Texarkana, Texas. He was convicted and sentenced to die by injection. On January 5, 1983, The Texas Court of Criminal Appeals denied the Petitioner's Motion for Rehearing.

### Voir dire of Venire Members

The Texas Penal Code section 12.31 (b), which requires the exclusion for cause of every prospective juror in a capital case who is unable to swear that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Prospective jurors #11, Amy Rogers and Juror #35, Juanita Swanger were excused for cause, systematically, because they would not automatically answer in the negative the fact issues.

#### A. Voir dire of Venire member Amy Rogers

Mrs. Rogers expressed religious scruples against the imposition of the death penalty. She does maintain, however, that she could follow the Court's instructions and answer questions from the evidence if selected as juror. The record reflects the following under cross examination by Appellant's Attorney:

Q. Now, then, I certainly respect your beliefs, just like Mr. Rafaeili does, and --but let me ask you if selected as a juror, would you follow the court's instructions and answer the questions from the evidence that you heard?

A. I sure would, to the best of my ability.

Q. All right, and then you would let the law take its course. Then the Judge and his job come into play

after you answer questions. Would you do that.

A. Right; I sure would.

Q. All right, and regardless of the death penalty or life sentence, you would answer--you would follow the Judge's instructions to you, would you not?

A. Well, I would feel like I had to, you know.

Q. All right, and you would answer any questions asked of you from the evidence that you heard in this trial. Would you do that?

A. Yes, sir.

Q. I submit, Your Honor, she is qualified. (ROA 498-499).

The complete transcript of the questioning of Amy Rogers is annexed as Appendix "B"

B. Voir dire of Venire Member Juanita Swanger

Mrs. Swanger, expressed moral principles and conscience both as reasons that were so firm that she would automatically vote against the death penalty. After hearing it explained that the jury's function is to answer questions that the judge asks about the evidence, " then the Judge, based upon those answers, imposes the sentence" - concluded her voir dire as follows:

"Q. If seated as a juror in this case, and the Judge tells you from the evidence, answer these questions, would you follow the Judge's instructions?

A. If seated, I would have to, wouldn't I?

Q. Right. And so would you?

A. If seated, I would."

The jury ultimately selected convicted petitioner and sentenced him to die. Petitioner's challenge on appeal to the constitutionality of the exclusion for cause of venire members Rogers and Swanger was rejected by the Texas Court of Criminal

Appeals, and his conviction and death sentence were affirmed.

HOW THE FEDERAL QUESTIONS  
WERE RAISED AND DECIDED BELOW

In his brief before the Texas Court of Criminal Appeals and his rehearing application addressed to that Court, petitioner contended that the exclusion for cause of prospective jurors Rogers and Swanger pursuant to Texas Penal Code Section 12.31(b) is in violation of the rule of Witherspoon as further defined by Adams v. Texas and in doing so should be prohibited by the Due Process Clause of the 14th Amendment. The Court of Criminal Appeals rejected this contention in affirming his conviction and sentence and denying rehearing.

In Adams v. Texas (1980) 100 S.Ct. 2521, 448 U.S. 38, 65 L.Ed 581, the Supreme Court of the United States reaffirmed Witherspoon v. Illinois, 391 U.S. 510 (1968) and invalidated the jury selection practice that as in the instant case excluded jurors in capital murder cases merely because they could not swear, pursuant to Texas Penal Code 12.31(b), that the prospect of the death penalty would not "affect" their deliberations. In the case at bar, Mrs. Amy Rogers, juror number eleven, expressed religious scruples against the imposition of the death penalty. She does maintain, however, that she could follow the Court's instruction and answer questions from the evidence if selected as juror. The Record reflects the following under cross examination by Appellant's attorney:

Q. Now, then, I certainly respect your beliefs, just like Mr. Raffaelli does, and--but let me ask you if selected as a juror, would you follow the court's instructions and answer the questions from the evidence that you heard?

A. I sure would, to the best of my ability.

Q. All right, and then you would let the law take its course. Then the Judge and his job come into

play after you answer questions. Would you do that?

A. Right; I sure would.

Q. All right, and regardless of the death penalty or life sentence, you would answer--you would follow the Judge's instructions to you, would you not?

A. Well, I would feel like I had to, you know.

Q. All right, and you would answer any questions asked of you from the evidence that you heard in this trial. Would you do that?

A. Yes, sir.

Q. I submit, Your Honor, she is qualified." (ROA 498-499)

Based on the above answers given by Mrs. Rogers, the decision of the Court to exclude Mrs. Rogers for cause was constitutionally invalid.

Juror number 35, Mrs. Juanita Swanger, having expressed moral principles and conscience both as reasons that were so firm that she would automatically vote against the death penalty, stated further that she was not sure if she could follow the law (ROA 1216). But when asked by defense counsel, "if seated as a juror in this case, and the Judge tells you from the evidence, answer these questions, would you follow the Judge's instructions?" Mrs. Swanger replied, "If seated, I would have to, wouldn't I?" and again, "If seated, I would." (ROA 1222).

Juror number thirty-five, like juror number eleven, was not shown to be "sufficiently unbending to meet Witherspoon's standards." The exclusion of these veniremen was a violation of the Appellant's Sixth and Fourteenth Amendment rights under the principle established in Witherspoon, supra.

The Appellant was seriously prejudiced on the issue of punishment when the State was allowed to exclude anyone who was not "uncommonly willing to condemn him to die." The Appellant's

rights being so violated cannot be considered harmless error, and the sentence and conviction cannot be sustained.

Here, like in Adams and in Witherspoon, there was not a showing that the excluded prospective jurors made it

"unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Id., at 522-523, n. 21 (emphasis in original).

65 L.Ed 2d at 589. And the Court further repeats that "if prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out, Witherspoon v. Illinois, supra, at 522, n. 21." 65 L.Ed. 2d at 591.

Adams explicitly holds that Witherspoon "applied to the bifurcated procedure employed by Texas in capital cases," 65 L.Ed. 2d at 589-90, and that exclusions pursuant to the Texas Penal Code 12.31(b) must comport with the Witherspoon standard to the constitutionally valid. Id. at 590.

The State could, consistently with Witherspoon, use § 12.31(b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But the use of § 12.31(b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible.

Id. at 592. Accordingly, to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Id. at 593.

Burns v. Estelle, 626 F.2d 396, applies the principles of Adams to invalidate the exclusion for cause of a prospective juror who presented "a stronger initial case for disqualification than the veniremen considered in Adams," supra, holding that the

State's questioning of that prospective juror "simply did not go far enough" to disqualify her, ibid. Many of the venire members excluded in Adams had not declared outright opposition to capital punishment; the prospective juror discussed in Burns, on the other hand, made statements against capital punishment which were "strong expression indeed," 626 F.2d at 397. Nonetheless, the en banc Fifth Circuit held that her statements

fall short of unequivocal avowals disqualifying her under either aspect of Witherspoon's two-pronged test, reiterated by the Court in Adams: (quotation omitted). . .

As to its prong concerning the imposition of the death penalty, she did not testify that she would automatically vote against it, regardless of what the evidence might show. As to its guilt-or-innocence prong, she did not "make unmistakably clear" that her attitude toward the death penalty would prevent her from making an impartial decision as to guilt. These are the two talismans; and had her answers unmistakably and plainly contravened either, she might properly have been excused.

But her answers did not do so. As to the penalty aspect of the test, she merely expressed disagreement with it. As to its guilt-or-innocence prong--if guilt or innocence be viewed as an issue of ultimate fact--she testified merely that the presence of the penalty would "affect" her deliberations, with little or no indication of how profound that effect would be. This was not enough.

Likewise in the instant case, it was not enough that the prospective jurors professed religious and/or moral principles against the death penalty. The erroneous ruling by the Trial Court to the Challenge for Cause of these two prospective jurors may well have made the difference in the sentence that was imposed. This Court should once and for all end the continuing application of the dictates of Witherspoon v. Illinois as a "ground of exclusion" in direct controvention in Adams v. Texas.

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82 6498

DELMA BANKS, JR., Appellant

NO. 68,933 v.

-- Appeal from BOWIE County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for the offense of capital murder. The punishment is death.

The appellant contends that the evidence is insufficient to support the verdict. He further contends that the following error occurred: his motion for a change of venue was overruled; the jury panel was prejudiced by contact with the prosecutor's investigator; the appellant's right to a presumption of innocence was violated; two prospective jurors were improperly excused for cause; gruesome photographs and hearsay evidence were improperly admitted; and the prosecutor's argument during the opening and closing of the guilt-innocence stage of the trial was improper.

The appellant complains that the evidence is insufficient to support the verdict of guilt for the offense of capital murder. The case was submitted to the jury on a circumstantial evidence charge, but the appellant contends the evidence does not exclude all reasonable hypotheses except guilt. He also contends that evidence does not establish that the murder occurred in the course of committing a robbery. See V.T.C.A. Penal Code, Section 19.03(a)(2).

The body of the deceased, Richard Wayne Whitehead, was found in an abandoned park near Nash on the morning of April 15, 1980. The deceased had been shot three times, twice in the head and once in the upper back. One shot had been fired at a maximum distance of eighteen to twenty-four inches. Near the scene several empty beer cans and two spent shell casings were found.

Patricia Hicks testified that she was a friend of the deceased and that she was with the deceased during the evening of April 11, 1980. Whitehead was driving his automobile, a two-door 1969 Mustang with a light green colored body, a black vinyl top, and red hood. During the course of the evening the pair were joined by the appellant and at his suggestion beer was purchased. The three went to the park near Nash and drank beer. The appellant's residence was a little more than a half mile from the park. At approximately 11:00 or 11:15 p.m. Hicks was taken home.

Patty Bungardt testified that the appellant and the deceased visited her at her house around 11:30 p.m. on April 11. They stayed for approximately ten to fifteen minutes.

Mike Fisher testified that he lived about one hundred yards from the park in Nash. At approximately 4:00 a.m. on April 12, he heard two gun shots.

Charles Cook testified that he met the appellant on the morning of April 12 in Dallas. The appellant was driving a vehicle which had the same description as the deceased's. Cook and his wife befriended the appellant and allowed him to stay with them at Cook's grandfather's home. Cook had noticed a sprinkle of blood on the appellant's pants and asked the appellant about it. The appellant told him that he had shot a white boy. Later that evening the appellant told Cook that he had killed someone. The appellant told him he had been riding around with a white boy and his girl friend, and after they took the girl home he and the white boy went to the woods together and drank beer. The appellant decided to kill the person for the hell of it and take his automobile to Dallas. Cook eventually obtained a pistol and the automobile from the appellant. The pistol was later identified through ballistic testing as the murder weapon. The appellant later returned to Texarkana by bus. Cook sold the pistol to his

neighbor and took the automobile to West Dallas and left it. It was never recovered. The pistol was recovered from the neighbor, Bennie Lee Jones.

Cook's wife and sister testified that they saw the appellant driving a green Mustang on April 12. Cook's grandfather stated that the appellant stayed at his house for a night or two. Cook's neighbor, Jones, also testified that he met the appellant during the same time. Appellant told him he had had a little misunderstanding with someone and had broken his jaw or "something like that." Appellant asked Jones "did I want to buy any iron, whatever, to make it back to Texarkana."

After the deceased's body was found the appellant was placed under surveillance by law enforcement officers. On April 23 or 24 they observed the appellant, Marcus Jefferson, and Robert Farr, drive together from Texarkana to Dallas. The appellant was driving the vehicle and after a few stops he eventually went to where Cook resided. The officers watched appellant leave the automobile, walk to the front door and then return to the automobile carrying an object. Jefferson and Farr testified that when the appellant returned to the automobile he told them that Cook did not have his gun and Cook gave him another gun.

The appellant did not testify and did not present any evidence.

We conclude that the evidence is sufficient to establish that the appellant intentionally caused the death of Whitehead while in the course of committing robbery. *Autry v. State*, 626 S.W.2d 758 (Tex.Cr.App. 1982). Compare *Stogsdill v. State*, 552 S.W.2d 481 (Tex.Cr.App. 1977); *Flores v. State*, 551 S.W.2d 304 (Tex.Cr.App. 1977). In addition to appellant's admission that he killed Whitehead and stole his vehicle the evidence shows that the appellant was the last person seen with the deceased when he was alive. The appellant was seen in the deceased's automobile in

Dallas the following day. The murder weapon belonged to the appellant. The evidence is sufficient to support the jury's verdict.

The appellant asserts that the trial court abused its discretion in overruling his motion for a change of venue. The appellant properly filed the motion alleging that because of pretrial publicity there existed in Bowie County "so great a prejudice against him that he [could] not obtain a fair and impartial trial." See Article 31.04, V.A.C.C.P. The State filed an affidavit controverting the appellant's motion for change of venue. See Article 31.04, V.A.C.C.P. The trial court conducted a hearing and after all the evidence was presented, it overruled the appellant's motion.

Whether a motion for a change of venue should be granted because of prejudicial publicity is a question of constitutional dimension. *McNanus v. State*, 591 S.W.2d 505 (Tex.Cr.App. 1979). The test to be applied is whether outside influences affecting the community's climate of opinion as to a defendant are inherently suspect. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1960); *Eckert v. State*, 623 S.W.2d 359 (Tex.Cr.App. 1981); *Bell v. State*, 582 S.W.2d 800 (Tex.Cr.App. 1979), cert. denied 453 U.S. 913, 101 S.Ct. 3245, \_\_\_ L.Ed.2d \_\_\_ (1981). At the hearing the appellant testified that he could not get a fair trial "because it had been on T.V., television, newspapers since it happened." Two other witnesses testified that they were unaware of any prejudice toward the appellant in Bowie County and believed he could receive a fair trial. No evidence of the contents of any newspaper article or radio or television broadcast was presented. In view of the lack of evidence of any prejudicial publicity, we conclude that the trial court did not abuse its discretion. *Stiehl v. State*, 585 S.W.2d 716 (Tex.Cr.App. 1979), cert. denied 449 U.S. 1114, 101 S.Ct. 926, 66 L.Ed.2d 843 (1981); *Demouchette v. State*, 591 S.W.2d 438 (Tex.Cr.App. 1979), cert. denied 453 U.S. 913, 101 S.Ct. 5115, \_\_\_ L.Ed.2d \_\_\_ (1981).

The appellant asserts that the panel of prospective jurors was unduly influenced by the actions of Charles Leathers, an investigator of the district attorney's office. He testified that, prior to voir dire, he had been asked by the bailiff to help pass to veniremen clipboards with questionnaires on them. He was asked some questions by the panel members and added he probably had contact with approximately half of the panel. Appellant argues that Leathers' conduct developed a rapport with the prospective jurors and bolstered the credibility of the prosecution. However, Leathers testified that he told none of the veniremen his name or that he worked for the district attorney. He was subsequently seen with personnel from the Sheriff's Department and he did not testify before the jury. We fail to see how the appellant was prejudiced by Leathers' conduct; the ground of error is without merit.

The appellant argues that error occurred when two deputy sheriffs attempted to escort the appellant out of the courtroom in the presence of the prospective jurors. During recess but before the panel had left the courtroom the appellant started to walk out of the courtroom. He was flanked on either side by a uniformed deputy sheriff. The appellant argues that their behavior was an infringement upon his right to a presumption of innocence because it indicated to the veniremen that the appellant was hostile and dangerous. However, the deputies did not put handcuffs on the appellant or restrain him in any manner. The appellant was not wearing jail or prison clothing. The judge and sheriff had expressed concern over security; they wanted the appellant removed from the courtroom first so that he would not have to be moved through crowded hallways. We conclude that in light of the minimal restraints on the appellant and the concern for security the trial court did not abuse its discretion. The appellant's

right to a presumption of innocence was not violated. *Thompson v. State*, 514 S.W.2d 275 (Tex.Cr.App. 1974); *Freeman v. State*, 556 S.W.2d 287 (Tex.Cr.App. 1977), cert. denied 434 U.S. 1088, 98 S.Ct. 1284, 55 L.Ed.2d 794; *Caraway v. State*, 550 S.W.2d 699 (Tex.Cr.App. 1977).

The appellant contends that two prospective jurors were improperly excused for cause by the trial court. The appellant relies upon *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) and *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Juanita Marie Swanger on voir dire testified:

"Q. Then I take it that this is a deep-seated and firm conviction on your part, and one that you have probably given lots of thought to.

"A. Yes, sir.

"Q. And that this feeling on your part is so firm that you would automatically vote against the death penalty, regardless of what the facts were.

"A. Yes, sir.

"Q. And I take it that this feeling is so deep-rooted and deep-seated that no set of fact, no matter how horrible or how gruesome, would change your opinion. Is that correct?

"A. No."

Amy Ola Rogers on voir dire testified:

"Q. Is this feeling on your part so firm that you would automatically vote against the death penalty, regardless of what the facts of the case might be?

"A. Yes, sir."

If prospective jurors were properly excused. *Witherspoon v. Illinois*, supra; *Adams v. Texas*, supra; *Vanderbilt v. State*, 629 S.W.2d 709 (Tex.Cr.App. 1981); *Williams v. State*, 622 S.W.2d 116 (Tex.Cr.App. 1981); *Bass v. State*, 622 S.W.2d 101 (Tex.Cr.App. 1981).

The appellant complains that the prosecutor's opening statement to the jury exceeded the scope of Article 36.01, V.A.C., C.P. by implying that the appellant had confessed to the crime. The prosecutor stated:

"I think you will see that this is a serious killing and that there was no need for Richard Wayne Whitehead to die. Delma Banks did kill Richard Wayne Whitehead, as he said, just for the hell of it."

However, the prosecutor stated twice without objection that the appellant had confided in Charles Cook and told Cook that he had killed the deceased and took his automobile. Furthermore, appellant's admission to Cook that he killed Whitehead for the hell of it was properly admitted in evidence. The opening remarks about evidence which was thereafter properly admitted did not constitute error. *Marini v. State*, 593 S.W.2d 709 (Tex.Cr.App. 1980).

The appellant contends that four photographs were admitted in evidence solely to inflame the jury. The four photographs depicted the deceased and appellant asserts that the photos were enlarged. He argues that their admission solved no issue and he relies in part upon *Whaley v. State*, 367 S.W.2d 703 (Tex.Cr.App. 1963) and *Borroum v. State*, 331 S.W.2d 314 (Tex.Cr.App. 1960). In *Martin v. State*, 475 S.W.2d 265 (Tex.Cr.App. 1972) cert. denied 409 U.S. 1021, 93 S.Ct. 469, 34 L.Ed.2d 312 (1972), we held that even though a photograph was gruesome it would be admissible if a verbal description of the scene were admissible; we overruled the requirement that a gruesome photograph's admission in evidence tend to solve a disputed issue. Here a verbal description was admissible and therefore the photographs were admissible. While there is no evidence in the record that the photographs were enlarged, the mere fact that they may have been enlarged does not render them inadmissible unless the sole purpose in the enlargement is to inflame the minds of the jury. *Quintanilla v. State*, 501 S.W.2d 329 (Tex.Cr.App. 1973).

The appellant next argues that prejudicial hearsay was improperly admitted in evidence. Marcus Jefferson testified he went with the appellant and Robert Farr to Dallas. They drove to the residence of Charles Cook, whose nickname was Two-two. The appellant walked up to the house while the pair remained in the automobile. When the appellant returned Jefferson testified that "He said that Two-two said some girl had his gun, and so Two-two gave him another gun." Appellant argues that this statement was inadmissible hearsay.

Initially, we note that the State's next witness, Robert Farr, testified about the same conversation without objection. Farr testified, "He [the appellant] said his gun was in West Dallas, and Two-two gave him a .22." Since the evidence complained of was admitted without objection from another source, no error is presented. *Bales v. State*, 598 S.W.2d 274 (Tex.Cr.App. 1980). Additionally, the appellant's statement to both Jefferson and Farr was admissible as an admission. The critical portion of the statement was based upon appellant's own personal knowledge. Furthermore, it is irrelevant that a portion of the statement was based upon hearsay since the appellant had adopted the statement as his own. 1A Ray, Law of Evidence, Section 1123.

The appellant asserts that the prosecutor alluded to the appellant's failure to testify. During his closing argument at the guilt-innocence stage of the trial the following transpired:

"Think about why Mr. Cooksey [the defense counsel] would want to call this a poor case. Drugs, all these rabbit trails, all those smoke screens that he wants you to hide behind and chase down. He wants you to think about anything except that six year old boy with three bullet holes in him. Anything at all. The State has produced the only evidence in this case."

Appellant's objection that the argument alluded to the appellant's failure to testify was overruled. The prosecutor continued, stating:

"If I may pick up where I was interrupted, the only credible evidence in this case has been produced by the State."

Again, appellant's objection was overruled.

The appellant argues that the prosecutor's remarks were a comment on his failure to testify and violated his rights under the United States Constitution and the Texas Constitution and violated Article 38.08, V.A.C.C.P. In order to violate the right against self-incrimination or Article 38.08, *supra*, the language, when viewed from the jury's standpoint, must be manifestly intended or of such a character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify. *Lee v. State*, 628 S.W.2d 70 (Tex.Cr.App. 1982); *Angel v. State*, 627 S.W.2d 424 (Tex.Cr.App. 1982); *Nowlin v. State*, 507 S.W.2d 534 (Tex.Cr.App. 1974). It is not sufficient that the language might be construed as an implied or indirect allusion. *Nowlin v. State*, *supra*. If the remark called the jury's attention to the absence of evidence that only the testimony of the defendant could supply, the implication as a comment on the defendant's failure to testify is a necessary one and the conviction must be reversed. *Myers v. State*, 573 S.W.2d 19 (Tex.Cr.App. 1978); *Angel v. State*, *supra*.

However, if the language used can be reasonably construed as referring to the appellant's failure to produce evidence other than his own testimony, it is not an improper remark. *Nowlin v. State*, *supra*. In the case at bar the prosecutor's remarks did not naturally and necessarily refer to the appellant's failure to testify. Here there was a myriad of evidence, other than his own testimony, that the appellant could have offered. The remark did not refer to any particular aspect of the case that only the appellant's testimony could refute. The language used was a comment on the failure to produce testimony other than his

own. *Antwine v. State*, 572 S.W.2d 541 (Tex.Cr.App. 1978);  
*Edmond v. State*, 566 S.W.2d 609 (Tex.Cr.App. 1978); *Woods v.*  
*State*, 374 S.W.2d 896 (Tex.Cr.App. 1964); *Nowlin v. State*,  
*supra*. The ground of error is overruled.

The judgment is affirmed.

DALLY, Judge

Delivered November 3, 1982

En Banc

Roberts, J., not participating

DELMA BANKS, Appellant

NO. 69,933

v. - - - Appeal from BOWIE County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

It is true that what the majority opinion extracts from the 20 odd pages of voir dire examination of venirewoman Rogers, appears in the record. That its significance is to establish the State's entitlement to a challenge for cause on the ground of bias,<sup>1/</sup> however, is unlikely. For after Rogers gave the excerpted response, it was fully explained to her by defense counsel that jurors in Texas do not "vote for" the death penalty, but instead, are to answer special questions according to the trial judge's instructions, by applying the evidence adduced. The effect of her answers were even explained in detail to Rogers by the trial judge. She nevertheless insisted several times thereafter that she would follow the judge's instructions, including answer the questions based on the evidence;<sup>2/</sup> the ultimate question and answer which preceded her exclusion were:

"Q: Mrs. Rogers, being a conscientious citizen of our county, you would, if chosen as a juror in this case or any case follow the judge's instructions, and you would answer any questions that the judge gives you from the evidence that you heard in the courtroom, wouldn't you?

A: I certainly would."

Similarly, venirewoman Swanger - after hearing it explained

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<sup>1/</sup> Presumably, the basis for the exclusion upheld is bias, see Article 35.16(b)(3), V.A.C.C.P., but the majority opinion does not identify it.

<sup>2/</sup> Though she admitted that she might be "affected" by the knowledge of effects of her answers.

that the jury's function is to answer questions that the judge asks about the evidence, "then the Judge, based upon those answers, imposes the sentence" - concluded her voir dire as follows:

"Q: If seated as a juror in this case, and the Judge tells you from the evidence, answer these questions, would you follow the Judge's instructions?

A: If seated, I would have to, wouldn't I?

Q: Right. And so would you?

A: If seated, I would."

From the majority's continuing application of the dictates of Witherspoon v. Illinois,<sup>3/</sup> as a "ground of exclusion" in direct contravention of Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), I must disassociate myself. See my dissenting opinion in May v. State, 618 S.W.2d 333 (Tex.Cr.App. 1981), vacated and remanded, 454 U.S. 959, 102 S.Ct. 497, 70 L.Ed.2d 374 (1981).

I dissent.

CLINTON, Judge

(Delivered November 3, 1982)

EN BANC  
PUBLISH

Teague, J., joins

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<sup>3/</sup> 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

AMY CLA ROGERS

a prospective juror called for Individual Voir Dire Examination, upon being first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, thereafter testified upon her oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. RAFFAELLI:

Q State your name, please, ma'am.

A Amy Rogers.

Q Judge, I believe--is Melba Brown--has she been excused?

MR. COOKSEY: Melba Brown is next,  
Your Honor.

THE COURT: She was excused.

MR. COOKSEY: She was excused?

THE COURT: Yes. That was on the  
first day.

MR. COOKSEY: All right, sir.

THE COURT: After everybody had  
already gone. She was the one that had that medical state-  
ment.

MR. COOKSEY: Yes, sir, that's  
right.

THE COURT: ...that we took up,

1 and said you had no objection to excusing her without the  
2 necessity of a hearing in open court.

3 MR. COOKSEY: Right; she had a  
4 statement from a doctor that she was unable to serve as a  
5 juror.

6 THE COURT: Right. All right, you  
7 may proceed.

8 Q Thank you, Your Honor. Mrs. Rogers, for  
9 the record will you please state your name?

10 A Amy Rogers.

11 Q Okay, and Mrs. Rogers, I'm Louis Raffaelli.  
12 I'm the District Attorney of Bowie County. To my immediate  
13 left here is James Elliott, who is an Assistant District  
14 Attorney.

15 A How do you do.

16 Q It's our privilege to represent the  
17 State of Texas and the people of Bowie County in this matter.  
18 I think you can tell from the period of time he has taken us  
19 to get things done, and as the Judge has told you, we're  
20 dealing with a very serious case.

21 A Yes, sir.

22 Q The purpose of this individual Voir Dire  
23 is to give us a better opportunity to know the jurors than  
24 we would normally have if we introduced them all at one time.  
25 Voir Dire means nothing more than to speak the truth. I'm

1 not trying to pry into your past or find out any personal  
2 thing s about you. I just want to visit with you on a v.  
3 few subjects and find out your personal thoughts on those  
4 subjects, alone. You understand that, do you not?

5 A Yes, I understand.

6 Q and the purpose of this is to enable the  
7 State and the Defendant to pick a jury that will be fair and  
8 impartial. I want to urge you or tell you up front that  
9 there is no right answers and there's no wrong answers.  
10 We're not trying to quarrel with you or change your opinion  
11 we respect your opinion, and we just want to know what that  
12 opinion is. To my immediate right is Lynn Cooksey, and I  
13 believe you...

14 A I have met him.

15 Q Yes, I started to say I believe by  
16 answering the sheet we passed out earlier, that you've in-  
17 dicated that you know Mr. Cooksey.

18 A Yes.

19 Q Is that correct?

20 A Right.

21 Q How do you know Mr. Cooksey, please,  
22 ma'am?

23 A Well, I was on the jury.

24 Q That's not a personal relationship?

25 A No.

1 Q Church, or...

2 A No.

3 Q ...anything like this?

4 A No.

5 Q The fact that you were on a jury that  
6 Mr. Cooksey was on...

7 A That's right. That's all I know him  
8 from.

9 Q But that wouldn't have any persuasion on  
10 you as regards to this matter?

11 A No.

12 Q One way or the other, would it not?

13 A No.

14 Q You wouldn't hold that against the State  
15 or For Mr. Cooksey?

16 A No.

17 Q You wouldn't hold it against Mr. Cooksey,  
18 either, would you?

19 A No.

20 Q Okay. Immediately to Mr. Cooksey's  
21 right is Delma Banks. He is the person who is charged with  
22 capital murder in this case. As I explained to you, this is  
23 a capital murder case, and let me basically explain to you  
24 what capital murder is under the laws of the State of Texas.  
25 Murder is the intentional killing of a human being, and it

1 becomes capital murder, as the State has alleged, when a  
2 human being is intentionally killed during the course of a  
3 robbery committed by the defendant. Do you have any par-  
4 ticular disagreement with the law of capital murder as I  
5 have just set out to you?

6 A Well, I don't believe in taking--you  
7 know, death. I don't think we have no--I think that's the  
8 Lord's--I think it's wrong.

9 Q Yes, ma'am, I understand that. There  
10 are many people who feel that way.

11 A Well, I do.

12 Q And...

13 A I have a son that's a minister, and I  
14 said that would go completely against his religion and mine,  
15 too, really.

16 Q Okay, and I take it that you have very  
17 strong religious, consciencious and moral principals against  
18 the death penalty?

19 A Yes.

20 Q ...as any type of punishment for any case?  
21 Is that correct?

22 A No, I think they need punishment, but  
23 not death.

24 Q well, I'm saying that you are opposed to  
25 the death penalty as being a type of punishment.

1 A Yes.

2 Q ...in a criminal case.

3 A Yes, I don't think any human being has  
4 a right to take another one's life.

5 Q Okay. Then I take it from what you have  
6 stated that if you were selected as a juror in this case,  
7 that you could not vote for the death penalty?

8 A No, I couldn't.

9 Q Okay. And I take it that this is a deep-  
10 seated and firm conviction on your part?

11 A That's right.

12 Q One that you probably have given lots of  
13 thought to.

14 A I certainly have.

15 Q I assume that since your son is a  
16 minister, you more likely talked it over with him on numerous  
17 occasions.

18 A Well, no, I haven't, but I just was  
19 taught that all my life and I believe it.

20 Q Okay. Is this feeling on your part so  
21 firm that you would automatically vote against the death  
22 penalty, regardless of the facts of the case?

23 A Pardon me?

24 Q Is this feeling on your part so firm that  
25 you would automatically vote against the death penalty,

1 regardless of what the facts of the case might show?

2 A Yes, sir.

3 Q Then I take it that this feeling of  
4 yours is so deep-rooted that no set of facts, no matter how  
5 horrible or how gruesome, would change your mind. Is that  
6 correct?

7 A I don't think so.

8 Q Okay. I'm not here, trying to argue  
9 with you. I just want to make sure that those feelings of  
10 yours are deep-seated.

11 A Well, I just feel like I couldn't--my  
12 conscience wouldn't let me rest if I had helped to put some-  
13 one to death. That's just the way I feel.

14 Q I understand that, and I'm not trying to  
15 change your mind.

16 A Yes, sir, I understand.

17 Q And you wouldn't let somebody change  
18 your mind, would you?

19 A No.

20 Q I can tell, ma'am, that you do have  
21 deep-seated convictions, and you have given it lots of  
22 thought.

23 A That's right.

24 Q Your Honor, under that circumstance we  
25 would submit Mrs. Rogers for cause.

1 MR. COOKSEY: I would like to cross.

2 THE COURT: All right, you say, Mr.

3 Cooksey.

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1 CROSS EXAMINATION

2 BY MR. COOKSEY:

3 Q Mrs. Rogers, I sure recognize your face,  
4 but I don't remember how long ago it was you served...

5 A Well, it has been quite a many years ago.  
6 We lived at Hooks, you know.

7 Q Okay.

8 A We live now in Texarkana.

9 Q Okay, and was that a criminal case, or  
10 a civil case?

11 A No. I don't remember just exactly what  
12 it was about, it has been so long ago.

13 Q Then you can understand...

14 A But I remember you.

15 Q You can understand how lawyers forget,

too, then, can't you?

A Yes, that's right.

Q After so many years, Mrs. Rogers, these things all start running together.

A That's right.

Q Let me explain this, Mrs. Rogers. In that case did the case actually go to the jury, and the jury go deliberate and decide the case, or do you recall?

A The jury decided.

Q Pardon me?

A I didn't understand the question.

Q All right, let me restate my question. You know, many times, especially with insurance companies involved, we get stuck...

A Well, this, I think, was. It was money involved.

Q We get started in the trial and get the jury picked, and the insurance company then will settle and pay our demand.

A Yes.

Q And then it's not necessary that the jury actually decide the case.

A Um-hum.

Q I was just wondering if that happened?

A Well, we--I think so. I think it was

1 decided--the jury decided.

2 Q The jury decided?

3 A I think so.

4 Q Okay, you remember that process?

5 A Best of my memory, that's the way it  
6 was.

7 Q All right. So if you deliberated, and then  
8 in that case, you would have to answer questions, and I'm  
9 sure that the jury that you were on answered some questions.

10 A Yes.

11 Q Now in a case such as this, it's similar  
12 in that the Court submits questions to the jury and the jury  
13 doesn't sentence to death or life. The Judge does that.  
14 All the jury does is they receive their instructions from the  
15 Judge, and from the evidence in the case they answer those  
16 questions, and then the Judge does whatever sentencing is  
17 required by law. Do you understand that?

18 A Yes.

19 Q Now, then, I certainly respect your be-  
20 liefs, just like Mr. Raffaelli does, and--but let me ask you  
21 if selected as a juror, would you follow the court's in-  
22 structions and answer the questions from the evidence that  
23 you heard?

24 A I sure would, to the best of my ability.

25 Q All right, and then you would let the law

1 take its course. Then the Judge and his job come into play  
2 after you answer questions. Would you do that?

3 A Right; I sure would.

4 Q All right, and regardless of the death  
5 penalty or life sentence, you would answer--you would follow  
6 the Judge's instructions to you, would you not?

7 A Well, I would feel like I had to, you  
8 know.

9 Q All right, and you would answer any  
10 questions asked of you from the evidence that you heard in  
11 this trial. Would you do that?

12 A Yes, sir.

13 Q I submit, Your Honor, she is qualified.

14 THE COURT: Let me ask you this,  
15 Mrs. Rogers. If you were advised that by answering--let's  
16 say that you had--members of the jury found the defendant was  
17 guilty of the offense of capital murder. And if you were  
18 advised that in the sentencing stage or what type of punish-  
19 ment would be inflicted, you were advised that by answering  
20 the questions that would be asked of you in a certain way,  
21 that it would automatically mean the imposition of the death  
22 sentence by the Judge, and if they were answered another way,  
23 it would mean the imposition of a sentence of life imprison-  
24 ment, and if you knew that, would that influence you in  
25 answering those questions, that you knew that by answering



1 about it, let me say--I want--like Mr. Raffaelli said, there  
2 are no correct answers or right answers or wrong answers.

3 MR. COOKSEY: Excuse me, Your Honor.  
4 Let me protect my record. I would object to the Court at-  
5 tempting to disqualify the witness since the State is in  
6 possession of fifteen Pre-emptory challenges and has not  
7 exercised one in the third day of this jury selection.

8 THE COURT: All right, the objection  
9 is overruled. I'm not trying to disqualify her. I'm trying  
10 to--let the record show that the Court just wants to be sure  
11 that this prospective juror understands what will be requir-  
12 ed of her if she would be selected as a juror. The question  
13 that I wanted to ask you is whether the fact that you knew  
14 that if you answered a question in a certain way, that the  
15 Court would impose the death sentence...

16 A I think so.

17 THE COURT: Would that make you  
18 answer the questions--or have an influence on how you would  
19 answer those questions; if you knew that the Judge would  
20 impose the death sentence if you answered them a certain way,  
21 would it affect how you would answer those questions?

22 A I believe it would.

23 MR. COOKSEY: Your Honor, might we  
24 inquire if she would answer contrary to the evidence?

25 THE COURT: All right, now--I'm

going to let the District Attorney.

MR. RAFFAELLI: Thank you, Your Honor.

RE-DIRECT EXAMINATION

BY MR. RAFFAELLI:

Q Mrs. Rogers, I think you can see what we're all looking for is somebody who will be open and honest and fair to the State and fair to the defendant. As the Judge said, we're not trying to persuade you one way or the other; we just want to know what your deep-rooted, firm convictions are, and if you don't have any, you don't have any. If you've got them, we want to know what those are.

A Well, yes, I've got them.

Q Okay.

A Deep.

Q Okay.

A I've got them.

Q I believe you. Okay?

1           A           Well, good.

2           Q           You've convinced me.

3           A           Good.

4           Q           Q     Now let me ask you this. You stated  
5 that you are opposed to the death penalty.

6           A           Yes.

7           Q           And now I'm not trying to put words in  
8 your mouth, so if I misstate you, you tell me. Okay?

9           A           Okay.

10          Q           You stated that under no circumstances  
11 you could give the death penalty. Is that correct?

12          A           No.

13          Q           Now Mr. Cooksey and the Judge have gone  
14 into some special issues. Now without going into those  
15 special issues, I'll tell you and the Judge has hinted to  
16 you, I'll say, that you will be required to answer those  
17 special issues yes or not. The Legislature lets us tell  
18 you the answers, as to the effect of those answers. Yes  
19 means death. No means life. Cut and dry. Every time you  
20 write the word yes, it's the same as writing death.

21                   MR. COOKSEY: Now, Your Honor, I  
22 object to that. That is a misstatement of the law.

23          Q           Your Honor, she has got to write the  
24 word yes or no, and that's the only thing that I'm asking  
25 her, but I want her to fully understand what the effect of

those words are. The law allows us to tell her what those words are. I'm not telling her she has to write "death" or I'm not telling her she has to write "life." She must write "yes" or "no," but she is entitled to know what the law is, the effect of those words.

MR. COOKSEY: Your Honor, the law is very clear. In the event of a jury verdict, the Judge imposes either life or death.

THE COURT: This is correct. Mr. Raffaelli is correct in that the law does allow the informing of a prospective juror of the result of the answer.

MR. COOKSEY: Yes, sir.

THE COURT: You may continue.

Q Now the law requires us to prove those issues beyond a reasonable doubt, each of those three issues. What I'm asking you, can you take part in a proceeding that would give a person the death sentence?

A I don't think so.

MR. COOKSEY: That is an improper question, Your Honor. He's implying to this lady that she would give the death sentence, and that's not true.

Q Your Honor, I asked if she would be taking a part in it. She would be making a judgement as to particular facts that would be submitted to her, and she would have to answer those questions to the best of her

1 ability, in accordance with the law and the evidence present-  
2 ed to her. The State is not held to any higher test than  
3 beyond a reasonable doubt. I think...

4 THE COURT: I overrule the ob-  
5 jection. You may continue.

6 MR. COOKSEY: Note my exception.

7 Q Now is it my understanding that under  
8 no circumstances...

9 A That's right.

10 Q ...you could give a death sentence.

11 A Not and...

12 Q Even if we showed you...

13 A My conscience wouldn't let me.

14 Q ...beyond a reasonable doubt that the  
15 person who is accused of doing something did what he did?

16 MR. COOKSEY: Your Honor--excuse me.  
17 May I have--so that I won't have to interrupt Mr. Raffaelli,  
18 under Jurak Vs. Texas, which the Supreme Court approved our  
19 statutes and our interrogatories, special issues, may I have  
20 a running objection as to him saying that the jury or this  
21 juror would impose the death sentence, as a misstatement of  
22 the law?

23 THE COURT: This is a misstatement  
24 of the law.

25 MR. COOKSEY: Yes, sir.

1 THE COURT: I think you need, Mr.  
2 Raffaelli, to be more specific in that regard. I know it  
3 is...

4 Q Your Honor, I do not think I have said  
5 that she would impose the death sentence.

6 THE COURT: I don't know that you  
7 have said, but if that is the objection...

8 Q If that's what I said, please, ma'am,  
9 that is a misstatement of the law, and I'll state to you  
10 now that what I saw is not the law and what Mr. Cooksey says  
11 is not the law. The law comes from that bench. I think I  
12 asked you would you take a--could you take a part in a pro-  
13 ceeding that would impose the death sentence.

14 A Um-hum.

15 THE COURT: Your answer? Speak out.

16 A No.

17 Q Then I take it that if you were forced  
18 to sit on that jury, that regardless of what the State proved  
19 to you, even if it proved to a moral certainty, no doubt  
20 whatsoever, to a mathematical certainty, if we proved each  
21 and every element of the indictment that we would present  
22 against the defendant, you would still vote--you still could  
23 not vote for the death sentence?

24 A No. To my notion, it's not right, you  
25 know, to kill someone.

1 Q Yes, ma'am, and I firmly respect that  
2 opinion. Again, we would submit her for cause.

3 MR. COOKSEY: I just have a couple  
4 of questions, Your Honor.

5 THE COURT: All right.

RE-CROSS EXAMINATION

BY MR. COOKSEY:

Q Mrs. Rogers, being a conscientious citizen  
of our county, you would, if chosen as a juror in this case  
or any case follow the Judge's instructions, and you would  
answer any questions that the Judge gives you from the evi-  
dence that you heard in the courtroom, wouldn't you?

A I certainly would.

Q Thank you.

MR. RAFFAELLI: Your Honor, we  
would again reurge our motion.

THE COURT: I'm going to grant the  
State's motion, and you are free to leave, and again, go by  
the Clerk's office and pick up your check, and thank you

1 very much.

2 MR. COOKSEY: Judge...

3 MR. RAFFAELLI: Mrs. Rogers, thank  
4 you very much for your candid answers.

5 MR. COOKSEY: Thank you, Mrs. Rogers.

6 A Thank you.

7 THE COURT: You may go around that  
8 way. That's fine.

9 A Okay.

10  
11  
12 (At this time the prospective juror  
13 left the courtroom and the follow-  
14 ing proceedings were had with no  
prospective jurors being present,  
as follows, to-wit:)

15  
16  
17 MR. COOKSEY: Your Honor, the de-  
18 fendant, Delma Banks, Jr., objects to the court excusing  
19 Juror No. 11, Amy Ola Rogers, upon motion for a challenge  
20 for cause by the State, for the reason that she stated that  
21 she would comply with the court's charge and she would answer  
22 any interrogatories from the evidence; and that based upon  
23 that, she is not disqualified in a capital case, and we want  
24 our objection noted and ask the court to make a ruling on  
25 this objection.

1 THE COURT: Did the State...

2 MR. RAFFAELLI: Judge, I didn't  
3 really hear the question. I was just asking Mr. Elliott--  
4 I'll ask Mr. Elliott to answer.

5 MR. ELLIOTT: All right, here is  
6 your point, Your Honor. This lady has stated irrevocably  
7 that she is unalterably opposed to the death sentence under  
8 any circumstance. The question Mr. Cooksey asked her was  
9 simply would she follow the evidence and the law in the case.  
10 Now I'm sure we must recognize that a layman does not quite  
11 understand what is going on here, but on many occasions  
12 stated that under no circumstances would she impose the  
13 death sentence as punishment for capital murder. So the  
14 question is does Mr. Cooksey's statement to her, the question  
15 to her and her answer, rehabilitate her. The State's position  
16 would be that it does not, Your Honor. That it in no way  
17 elicited an answer in the affirmative from this particular  
18 venireman that she would impose the death sentence or that  
19 she could impose it--that she could do that. Our question  
20 to her was specific; Mr. Cooksey's question was of a general  
21 nature, Your Honor.

22 THE COURT: Very well. The motion  
23 of the defendant is denied.

24 MR. COOKSEY: Note our exception.

25 THE COURT: Yes.

1 MR. COOKSEY: Your Honor, may we  
2 approach the bench?

3 THE COURT: Yes.  
4  
5

6 (At this time an off-the-record  
7 conversation was had at the bench  
8 among counsel for the parties and  
9 the court, out of the hearing of this  
10 reporter, after which the following  
11 proceedings were had in open court  
12 as follows, to-wit:)  
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15

16 JAMES A. BROWN  
17 a prospective juror called for Individual Voir Dire Examina-  
18 tion, upon being first duly cautioned and sworn to testify  
19 the truth, the whole truth, and nothing but the truth, there-  
20 after testified upon his oath as follows, to-wit:

21 DIRECT EXAMINATION

22 BY MR. RAFFAELLI:

23 Q Mr. Brown, state your name for the  
24 record, please, sir.

25 A James A. Brown.

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sincerely appreciate Mr. Pavey's candor and honesty, and I would challenge Mr. Pavey for cause and ask that he be excused.

Q Your Honor, the State would have no objection, but I would say, Mr. Pavey, knowing you know that I appreciate your honesty and integrity and your candor.

MR. COOKSEY: Sure do.

A Well, I'm just being honest with you.

Q Well, Mr. Pavey, that's exactly what this court wants.

THE COURT: The Court is going to grant the challenge for cause, and you may be excused and go into the District Clerk's office and pick up your check.

A Thank you.

JUANITA M. SWANGER

prospective juror called for Individual Voir Dire Examination, upon being first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth,

testified upon her oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. RAFFAELLI:

THE COURT: All right, you may proceed.

Q Thank you, Your Honor. Please the Court, Mrs. Swanger, state your name for the record, please.

A Juanita Marie Swanger.

Q Okay, Mrs. Swanger, my name is Louis Raffaelli. I'm the District Attorney of Bowie County, and my immediate left is James Elliott.

MR. ELLIOTT: M'am.

Q And he is my Assistant, and it will be our privilege to try this case in behalf of the State of Texas and people of this county. The process we're going through now is called a Voir Dire. It simply means to speak the truth. It gives us, the attorneys, an opportunity to get and know you a little bit better and to know your views on a very few limited subjects. We're trying to pick a jury that will be fair to the State and fair to the defendant. Do you understand that, do you not?

A Right.

Q This is--there are no right answers and no wrong answers. We're just asking you questions to find

your opinion, and we're not here to change that opinion.  
You understand that, do you not?

A . Right.

Q Now this is a capital murder case, I think the Court has told you, and I will so tell you, that basically, under the laws of the State of Texas murder is the intentional killing of a human being, and it becomes capital murder, as in this particular case the State alleges, that the human being was intentionally killed during the course of a robbery committed by the defendant. Do you have any particular disagreement with the law of capital murder, as I have just stated to you?

A No.

Q Okay. Do you understand that capital murder does not mean a mass killing or a crime on a violent scale or grand scale?

A Well, I'm really not too familiar with it.

Q Okay, but do you understand that you can have a capital murder for the taking of one human being's life during the course of robbing him of his property?

A Right.

Q Do you have any disagreement with that?

A Are you asking me do I believe in this?

Q Do you have any disagreement with the law?

A No, I don't.

Q Okay. Now I believe the facts will show that Delma Banks intentionally and knowingly killed Richard Wayne Whitehead during the course of robbing him of his automobile, and that Richard Wayne Whitehead, I think the evidence will further show, was a sixteen year old boy. That he was shot three times: once in the bac, back of the head, and between the eyes, and that it occurred in Nash, Texas. Do you know anything about those facts at all?

A Just what I read in the paper.

Q And because of that knowledge from the paper, has that biased you or prejudiced you in any way, do you feel?

A No.

Q You realize that the paper is not evidence, and makes mistakes occasionally?

A Right.

Q In fact, quite often.

A Yes, sir.

Q Okay, and I'll further state to you that this case was brought to you by a true bill of indictment returned by a grand jury of this county of twelve people. Do you understand that?

A Yes.

Q Okay. You realize a conviction of capital

1 murder carries with it an automatic life imprisonment or  
2 death?

3 A Yes.

4 Q And due to the nature of the case, the  
5 State is seeking the death penalty. Do you understand that?

6 A Yes.

7 Q And we feel as if it is the only proper  
8 punishment in this case. Do you understand that?

9 A Yes.

0 Q With that in mind, let me ask you if  
1 you have any preconceived thoughts and notions about the  
2 death penalty?

3 A Yes.

4 Q Okay, and will you share those thoughts  
5 or views with us, please, ma'am?

6 A I couldn't go for that.

7 Q Yes, ma'am, I understand that that is a  
8 very popular view. Many people share your thoughts. I take  
9 it that you have given it lots of thought?

0 A Very much.

1 Q And...

2 A Very much.

3 Q I take it then that those thoughts are  
4 deep-rooted and deep-seated?

5 A Right.

Q To--and I'm not questioning your thoughts. I'm not trying to change your thoughts. I'm trying to understand them. You understand that, do you not?

A Right.

Q But let me get into that a little further along that line of questioning and ask you is that because of any religious, conscientious or moral principals against the death penalty as any punishment for a crime in a proper case?

A Not especially. I just don't believe that I could live with my conscience if I went along with that.

Q Okay, and it is...

A It would worry me.

Q Well, I think you would agree, Mrs. Swanger, that nobody wants to sit on...

A Right.

Q And I think you further would agree with me that someone has to.

A Yes, sir.

Q Okay, but what I'm asking you, is it because of this subconscious feeling or mental process that you have gone through, either just religious or conscientious or just moral principals, or whatever reason...

A Moral principals and conscience, both.

Q Okay, and that you're against death as punishment for crime in any case? Is that correct?

A Yes, sir.

Q Then I take it that this is a deep-seated and firm conviction on your part, and one that you have probably given lots of thought to.

A Yes, sir.

Q And that this feeling on your part is so firm that you would automatically vote against the death penalty, regardless of what the facts were.

A Yes, sir.

Q And I take it that this feeling is so deep-rooted and deep-seated that no set of facts, no matter how horrible or how gruesome, would change your opinion? Is that correct?

A No.

Q And I think you have stated to me that that's your conviction, and you're going to stand by that conviction and no one could change you of that conviction. Is that correct?

A Right.

Q Let me go just a little bit further and tell you that His Honor would instruct you what the law is, and he would tell you that you would have to set aside your personal feelings and convictions and follow the law in this

case as given by him. Do you understand that?

A Yes, sir.

Q Do you think you could do that?

A I'm not sure.

Q Well, I'm not trying to change your convictions, nor am I trying to make you commit to yes, I'll do it, or no, I won't do it--is and I'm referring to the death penalty. Yes, I can give it, or no, I can't give it. I'm asking you because of your convictions do you think they are so deep-rooted and deep-seated that they are there, and regardless of what His Honor told you, even though you would certainly like to do what he instructs you and comply with his instructions, that you feel as if these feelings are so deep-seated that you just couldn't do it?

A I don't believe I could.

Q Okay, and I think the law will further-- or His Honor will further tell you that as a juror selected in this case, that you will a true verdict render according to the law and to the evidence, so help you God. Are you stating that you do not believe that because of your deep-rooted and deep-seated convictions, that you would be able to a true verdict render according to the law and to the evidence in this case, if selected?

A I'm not sure.

Q Well, ma'am, I'm not trying to quarrel

with you or argue with you. I want you to understand that.

A Um-hum.

Q But the law requires us to go further than a "not sure" answer, and we have got to know if you could or you couldn't, because I think you would agree that the laws of this state require a juror to be fair to the State and fair to the defendant, and I would not want you as a juror to come in with a bias or prejudice against Delma Banks. That would not be fair.

A Certainly wouldn't.

Q And I would want him to receive a fair trial; and at the same time I would want the State of Texas to be able to receive a fair trial. I wouldn't want you to come in with a bias or prejudice against the State, you know.

A Right.

Q So what I'm asking you is because of your beliefs, are you stating that you could not be a fair and impartial juror and rule according to the law and to the evidence?

A I could not.

Q All right.

A But I'm not biased, either.

Q I'm not asking--not accusing you of being biased. I did not mean to...

1 A No, I know.

2 Q ...to leave that impression. I'm just  
3 saying that sometimes because of our personal beliefs in  
4 something, you know, somebody may say by golly, anybody that  
5 has blue eyes lies every time he speaks. That's just some-  
6 thing that, you know, they have had enough people with blue  
7 eyes lie to them all their life. Or they may say, you know,  
8 I don't like people with--that are bald-headed. They're just  
9 biased against them and for just no reason. Or they might  
10 say that I have such a firm belief against the death penalty  
11 that I couldn't listen to the evidence and be a fair and im-  
12 partial juror, and I would want to be, and I think that's  
13 what the State wants, is a juror who is fair and impartial;  
14 and I believe you, and Your Honor, because of her convictions,  
15 we would submit her for cause.

16 Mr. COOKSEY: May I ask the court  
17 to take that under advisement for a moment?

18 THE COURT: All right.

19  
20  
21  
22  
23 CROSS EXAMINATION

24 BY MR. COOKSEY:

25 Q

Mrs. Swanger, my name is Lynn Cooksey, and

1 I represent Delma Banks in this case. I'm sure not trying  
2 to embarrass you, but are you related to our Mayor in  
3 Texarkana?

4 A Yes, sir.

5 Q You're related to Durwood?

6 A Yes.

7 Q How are you related to Durwood? I was  
8 kidding you about embarrassing you.

9 A Marriage; second cousin.

10 Q I was kidding you about embarrassing you.  
11 He's a very close friend of mine.

12 A He's a nice person.

13 Q Think a lot of him. Through your marriage,  
14 he's your second cousin?

15 A Right.

16 Q I guess all the Swengers are related,  
17 aren't they?

18 A Yes, sir.

19 Q Well, he's doing us a fine job as Mayor,  
20 too.

21 A Well, fine.

22 Q I call him Doctor Swanger.

23 A You do?

24 Q Yeah, he doctors me. Mrs. Swanger, no-  
25 body is trying to change your beliefs, your convictions, or

anything else. You understand that?

A Right.

Q And this process that we're going through, Mrs. Swanger, is required by law, and the Judge has no choice in it and neither do we. Okay?

A Right.

Q Let me ask you this, or let me state this to you. Under Texas law a jury does not impose the death sentence. Okay?

A Um-hum.

Q What the jury does, they are an arm of the court; they are a fact-finding body. Okay?

A Right.

Q They merely hear the evidence--not merely. That's an important job, but they hear the evidence, they answer questions that the Judge asks from that evidence. They return that back to the court, and then the Judge, based upon those answers, imposes the sentence. Okay?

A (No audible response.)

Q Now, you see...

THE COURT: You have to speak up, Mrs. Swanger, so that the court reporter may get your answer.

A Yes, sir.

Q I should have told you that. She has

got to record what you and I both say.

A Yes, sir.

Q If seated as a juror in this case, and the Judge tells you from the evidence, answer these questions, would you follow the Judge's instructions?

A If seated, I would have to, wouldn't I?

Q Right. And so you would?

A If seated, I would.

Q Okay, thank you, Mrs. Swanger. I believe you would, and I submit she is qualified, Your Honor.

THE COURT: I'm going to grant the State's motion to challenge for cause. You are free to go, and you may go through the District Clerk's office and pick up your check. Thank you.

(After the prospective juror, Juanita M. Swanger, had left the courtroom, the following proceedings were had, to-wit:)

MR. COOKSEY: Your Honor, now comes Delma Banks, Jr., by and through his attorney, and objects and except to the Court excusing Juror No. 35, Juanita M. Swanger, upon a challenge for cause by the State, for the reason that Mrs. Swanger said if seated as a juror, she would follow the Court's instructions and answer any

question submitted from the evidence; therefore, Your Honor, she is a qualified juror and not subject to challenge for cause.

THE COURT: All right, objection will be overruled, and call the next juror.

JAMES K. EMERSON

a witness called for Individual Voir Dire Examination, upon being first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, thereafter testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. RAFFAELLI:

THE COURT: All right, you may proceed.

Q Thank you, Your Honor. Mr. Emerson?  
A Yes, sir.